



DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 620

RIN 1205-AB63

Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants

Agency: Employment and Training Administration, Labor.

Action: Notice of proposed rulemaking.

SUMMARY: The Employment and Training Administration (ETA) of the U.S. Department of Labor (Department) proposes to establish in regulation, for State Unemployment Insurance (UI) program purposes, occupations that regularly conduct drug testing. These regulations would implement the Middle Class Tax Relief and Job Creation Act of 2012 (the Act) amendments to the Social Security Act (SSA), permitting States to enact legislation that would allow State UI agencies to conduct drug testing on unemployment compensation (UC) applicants for whom suitable work (as defined under the State law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of Labor (Secretary)). States may

deny UC to an applicant who tests positive for drug use under these circumstances. The Secretary is required under the SSA to issue regulations determining those occupations that regularly conduct drug testing.

DATES: To be ensured consideration, comments must be submitted in writing on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205-AB63, by one of the following methods:

Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the Web site instructions for submitting comments.

Mail and hand delivery/courier: Written comments, disk, and CD-ROM submissions may be mailed to Adele Gagliardi, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5641, Washington, D.C. 20210.

Instructions: Label all submissions with “RIN 1205-AB63.”

Please submit your comments by only one method. Please be advised that the Department will post all comments received that that related to this NPRM on <http://www.regulations.gov> without making any change to the comments or redacting any information. The <http://www.regulations.gov> Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. Therefore, the Department recommends that commenters remove personal information such as Social

Security Numbers, personal addresses, telephone numbers, and e-mail addresses included in their comments as such information may become easily available to the public via the <http://www.regulations.gov> Web site. It is the responsibility of the commenter to safeguard personal information.

Also, please note that due to security concerns, postal mail delivery in Washington, DC may be delayed. Therefore, the Department encourages the public to submit comments on <http://www.regulations.gov>.

Docket: All comments on this proposed rule will be available on the <http://www.regulations.gov> Web site and can be found using RIN 1205-AB63. The Department also will make all the comments it receives available for public inspection by appointment during normal business hours at the above address. If you need assistance to review the comments, the Department will provide appropriate aids such as readers or print magnifiers. The Department will make copies of this proposed rule available, upon request, in large print and electronic file on computer disk. To schedule an appointment to review the comments and/or obtain the proposed rule in an alternative format, contact the Office of Policy Development and Research at (202) 693-3700 (this is not a toll-free number). You may also contact this office at the address listed below.

Comments under the Paperwork Reduction Act: In addition to filing comments with ETA, persons wishing to comment on the information collection aspects of this rule may send comments to: Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-ETA, Office of Management and Budget, Room 10235, 725 17th Street, NW, Washington, D.C. 20503, Fax: 202-395-6881 (this is not a toll-free number), email: OIRA_submission@omb.eop.gov.

FOR FURTHER INFORMATION CONTACT: Adele Gagliardi, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5641, Washington, D.C. 20210; telephone (202) 693-3700 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

The preamble to this proposed rule is organized as follows:

I. Background -- provides a brief description of the development of the proposed rule.

II. Section-by-Section Review -- summarizes and discusses the proposed regulations.

III. Administrative Information -- sets forth the applicable regulatory requirements.

I. Background

On February 22, 2012, President Obama signed the Act, Pub. L. 112-96. Title II of the Act amended section 303, SSA, to add a new subsection (l) permitting States to drug test UC applicants as a condition of UC eligibility under two specific circumstances. The first circumstance is if the applicant was terminated from employment with the applicant's most recent employer because of the unlawful use of a controlled substance. (Section 303(l)(1)(A)(i), SSA.) The second circumstance is if the only available suitable work (as defined in the law of the State conducting the drug testing) for an individual is in an occupation that regularly conducts drug testing (as determined in regulations by the

Secretary). A State may deny UC to an applicant who tests positive for drug use under these circumstances. (Section 303(l)(1)(A)(ii), SSA.) This proposed rule defines those occupations that regularly conduct drug testing as required by section 303(l)(1)(A)(ii), SSA. The Department of Labor will, separately from this rulemaking, issue further guidance to States to address other issues related to the implementation of drug testing under 303(l), SSA.

Consultations with Other Federal Agencies

The Department consulted with a number of Federal agencies with expertise in drug testing to inform this proposed regulation. Specifically, we consulted with the Substance Abuse and Mental Health Services Administration (SAMHSA) in the U.S. Department of Health and Human Services (HHS); the U.S. Department of Transportation (DOT); the U.S. Department of Defense (DOD); the U.S. Department of Homeland Security (DHS); DOL's Bureau of Labor Statistics (BLS); and DOL's Occupational Safety and Health Administration (OSHA). These agencies were consulted because they have experience with required drug testing. DOD and DHS defer to SAMHSA for interpretation of the drug testing requirements. Therefore, the Department gave deference to the SAMHSA guidance when developing this rule. The Department also canvassed State laws to develop an understanding of what occupations require regular drug testing at the State level.

SAMHSA: The Department consulted with SAMHSA because it is the Federal agency mandated to oversee Federal workplace drug testing by Pub. L. 100-71 and, further, by E.O. 12564, entitled Drug-Free Federal Workplace. E.O. 12564 requires that the head of each Federal agency "shall establish a program to test for the use of illegal

drugs by employees in sensitive positions.” Pub. L. 100-71 directed HHS to establish scientific and technical guidelines and ensure that comprehensive standards are published to govern the drug testing of Federal employees. SAMHSA provides oversight for:

- The Federal Drug-Free Workplace Program, which aims to eliminate illicit drug use in the Federal workforce; and
- The National Laboratory Certification Program, which certifies laboratories to conduct forensic drug testing for the Federal agencies and for some Federally-regulated industries.

In order to oversee Federal workplace drug testing, SAMHSA reviews Federal agencies’ drug testing designated positions (TDPs), which SAMSHA requires Federal agencies to designate.

OSHA: ETA consulted with DOL’s OSHA because of its knowledge of employer drug testing programs. OSHA also was instrumental in identifying expertise in other Federal agencies that proved valuable to the development of the NPRM.

DOT: ETA consulted with DOT partly because DOT has a number of occupations designated as TDPs by SAMHSA, and more significantly because DOT regulations at 49 CFR part 40 identify public and private employment in transportation industries as being subject to drug testing. These regulations require that the Secretary of Transportation ensure drug and alcohol testing policies are developed and carried out in a consistent, efficient, and effective manner within the transportation industries for the ultimate safety and protection of the traveling public.

BLS: ETA consulted with BLS and determined that currently no statistical collections exist that relate to occupations where employers regularly drug test.

Review of State Drug Testing Laws

ETA's consultation did not reveal any single reliable and current source of occupations that regularly drug test. Therefore, ETA relied on current Federal and State laws as the primary sources to determine what occupations regularly drug test for purposes of implementing Section 303(l), SSA. Some States have not enacted workplace drug and alcohol testing laws. Others have enacted laws that permit and encourage employers to conduct drug testing of applicants and/or employees, but they are not based on occupations and therefore do not fall within the scope of this rulemaking. For example, most States allow a private employer to decide whether and when to test job applicants and employees, often in accordance with a written policy created by the employer according to State law. In some instances, State law specifies that the employer may test job applicants and current employees for any job-related purpose consistent with business necessity and the terms of the employer's written policy. If States do provide restrictions on workplace drug testing, then they commonly provide more protection to employees than to job applicants. For example, a State's law may permit employers to require all job applicants with conditional offers of employment to take drug tests, but they permit an employer to require a drug test of an employee only if the employer has reasonable suspicion that use of drugs is impairing the employee's job performance or has probable cause to believe that the employee, while on the job, is using or is under the influence of drugs. These provisions are not relevant to this rulemaking, which must, under section 303(l)(1)(A)(ii), SSA, determine what occupations are "regularly" drug tested.

Many States also provide various discounts and credits to employers that adopt drug-free workplace programs. Some States' programs require drug testing of applicants and/or employees as part of these programs, while others do not. Some States that require participating employers to test job applicants nevertheless allow the employers to limit such testing based on reasonable classifications of job positions. Employer sponsorship of a drug-free workplace program is usually voluntary but may be required of state contractors.

State laws that clearly fall within the scope of this regulation include those that identify types of positions for which employers may conduct drug testing. For example, a State's law may permit drug testing only of individuals "employed in safety-sensitive positions" or if the "employee serves in an occupation which has been designated as a high-risk or safety-sensitive occupation." At least one State permits testing of individuals who "participate in activities upon which pari-mutuel wagering is authorized."

State laws that identify specific classes of positions for which drug testing of applicants and/or employees is required also fall affirmatively within the scope of this regulation. State laws most commonly require drug testing of drivers of school transportation vehicles and commercial motor vehicles. States may also require certain types of private employers to conduct at least some drug testing of employees and/or job applicants (e.g., nursing homes and home health agencies, residential childcare facilities, public works projects contractors, corrections facilities, and nuclear and radioactive storage and transfer facilities).

In conclusion, ETA's research of some Federal and State laws related to drug testing found that they refer to classes of positions (e.g., any position requiring an

employee to carry a firearm) that are required to be drug tested, rather than occupations as defined by BLS in the Standard Occupational Classification System. Therefore, this NPRM defines (as explained below) an “occupation” to mean a position or class of positions identified as subject to drug testing under specified Federal or State laws as described in these proposed regulations.

Summary of the proposed rule

We concluded from our research of what it means in Federal or State law to “regularly” drug test that no consistent standard applies across classes of positions or occupations to determine that “regular” drug testing occurs. While some State laws might permit, but not require, drug testing of certain “occupations,” whether drug testing is “regularly” conducted when merely permitted can vary widely across occupations and industries and trades, and regularity also can change over time. Thus, we believe it would be overbroad to include occupations for which State law merely permits, but does not require, drug testing. However, it is a given that any occupation for which drug testing is required is one that is drug tested “regularly.” Therefore, occupations that “regularly” require drug testing are limited in these regulations to those for which drug testing is required, not merely permitted. Therefore, this proposed regulation identifies classes of positions, or “occupations,” that are required to be drug tested in Federal or State law as the standard for determining “occupations” that “regularly” drug test.

Accordingly, we propose that an applicant may be drug tested by the State in order to be eligible to receive State UC if the applicant’s only suitable work, as defined under the State UC law, is in a position or class of positions, i.e., an “occupation,” for which Federal law or that State’s law requires employee drug testing in that occupation.

Additionally, we propose that only those State laws which identify occupations or positions (e.g., school bus drivers) may be the basis for such testing; this regulation excludes, as the basis for testing, State laws that go beyond the scope of identifying occupations or position classifications, and instead identify types of employers (e.g., public works projects contractors) or permit testing at the employer discretion (e.g., in connection with a drug free workplace policy that applies to all applicants).

We also propose that classes of positions, or “occupations,” requiring drug testing under Federal and State laws be limited to those identified in Federal and State laws already in effect at the date of the publication of this NPRM. Because drug testing as a condition of UC eligibility is a new policy and has the potential to be implemented in ways that may have unintended consequences, the Department considers it prudent to apply Federal and State law drug testing requirements currently in place, to be able to assess and evaluate most effectively the impact of this new policy. The Department recognizes that Federal and State laws may evolve in identifying which positions or occupations are required to drug test. The Department will monitor such changes and may amend this regulation accordingly in the future. The Department encourages comments on methods to refresh the list of occupations that regularly drug test.

For Federal laws requiring drug testing, SAMHSA has designated some classes of positions as “presumptive” TDPs, i.e., positions that may be designated as requiring a drug test without the agency being required to justify the designation to SAMHSA. A list of presumptive TDPs is included in the HHS publication “2010 Guidance for Selection of Testing Designated Positions,” April 5, 2010, available on the SAMHSA website at <http://workplace.samhsa.gov/federal.html>. These classes of positions include those that

require carrying a firearm, motor vehicle operators carrying passengers, aviation flight crew members and air traffic controllers, and railroad operating crews. This NPRM proposes that these classes of positions be deemed “occupations” that regularly drug test.

In addition, DOT requires drug testing for classes of positions in various transportation industries in 49 CFR Part 40,¹ Procedures for Transportation Workplace Drug and Alcohol Testing Programs. These regulations require the Secretary of Transportation to ensure drug and alcohol testing policies are developed and carried out in a consistent, efficient, and effective manner within the transportation industries for the ultimate safety and protection of the traveling public. DOT’s Office of Drug and Alcohol Policy and Compliance provides guidance to the Federal agencies covered by DOT on the drug testing policy of covered employees (i.e., those subject to drug testing). The regulations apply to safety-sensitive classes of positions in the transportation industries including aviation, trucking, mass transit, railroads, pipelines, and other vital transportation related industries. Mandatory drug testing requirements are identified in the sections of the CFR that apply to the specific Federal agencies that regulate these industry sectors. Federal agency regulations that implement the drug testing requirements of 49 CFR part 40 for the industries these agencies regulate are as follows: Federal Aviation Administration, 14 CFR part 120; Federal Motor Carrier Safety Administration, 49 CFR part 382; Federal Railroad Administration, 49 CFR part 219; Federal Transit Administration, 49 CFR part 655; Pipeline and Hazardous Materials Safety Administration, 49 CFR part 199; and crewmembers and maritime credential holders by the Coast Guard, 46 CFR part 16. The proposed regulation identifies the

¹ DOT was granted authority to establish regulations at 49 CFR Part 40 by the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102-143.

specific sections of these regulations that identify the classes of positions that are subject to drug testing.

II. Section-by-Section Review

What is the Purpose of the Proposed Regulation? (§ 620.1)

Proposed § 620.1 explains that the purpose of the NPRM is to implement section 303(l)(A)(ii), SSA, permitting drug testing UC applicants for the use of controlled substances where suitable work (as defined under the State’s UC law) is only available in an occupation for which drug testing is regularly conducted (as determined under this part 620).

What Definitions Apply to this Part? (§ 620.2)

“Applicant” means an individual who files an initial claim for UC under State law. “Applicant” excludes an individual already found initially eligible and filing a continued claim. This is consistent with common usage of the term “applicant” in UC nomenclature.

“Controlled substance,” as defined by Section 303(l)(2)(B), SSA, has the same meaning given such term in section 102 of the Controlled Substances Act (Pub. L. 91-513, 21 U.S.C. 801 et seq.). “Controlled substance” means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of 21 U.S.C. 801 et seq. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

“Occupation” means a position or class of positions. As discussed above, Federal and State laws on drug testing do not specify or refer to “occupations” requiring drug

testing, but rather identify positions or classes of positions, in descriptive terms such as, for example, positions requiring the carrying of a firearm. Because we propose to refer to specific provisions of law in defining “occupations” for purposes of UC drug testing, the proposed definition of occupation identifies the specific provisions of law in the later section.

“Suitable Work” means suitable work as defined under the UC law of the State against which the claim is filed. This is the same definition of “suitable work” under that State law as the State otherwise uses for determining UC eligibility based on seeking work or refusal of work.

“Unemployment Compensation” is defined in Section 303(l)(2)(A), SSA, to have the same meaning given to the term in Section 303(d)(2)(A), SSA, which states that the term unemployment compensation means “any unemployment compensation payable under the State law (including amounts payable pursuant to an agreement under a Federal unemployment compensation law.)” Section 3306(h) of the Federal Unemployment Tax Act (26 U.S.C. 3306(h)) defines compensation to mean “cash benefits payable to individuals with respect to their unemployment.”

What are the Occupations for which Drug Testing is Regularly Conducted for Purposes of this Part 620? (§ 620.3)

Proposed § 620.3 identifies occupations for which drug testing is regularly conducted. These occupations are those that require the employee to carry a firearm. They also include classes of positions/occupations identified by SAMHSA as presumptive drug testing positions; classes of positions/occupations for which employers are required to drug test employees as identified in DOT’s regulations at 49 CFR parts

199, 219, 382, and 655; classes of positions/occupations for which drug testing is required under United States Coast Guard regulations at 46 CFR part 16; and classes of positions/occupations in which an employee must be tested under Federal Aviation Administration regulations at 14 CFR part 120. As explained above, these occupations are limited to those identified in these regulations as of the date of the publication of the proposed rule. They also include occupations for which drug testing was required already under State law in effect at the date of publication of this NPRM. States are not required to drug test as a condition of UC eligibility for any of these occupations; however, they may not, except as permitted by section 303(l)(1)(A)(i), SSA, (governing drug testing of individuals terminated for the unlawful use of a controlled substance) drug test for any occupation that does not meet the definition in § 620.3. As noted previously, it is the Department's intent to monitor Federal and State legislation in relation to classes of positions or occupations that are required to drug test and consider changes to the regulation as appropriate. DOL seeks comments on how to refresh the list of occupations.

What are the Parameters for the Testing of Applicants for the Unlawful Use of a Controlled Substance? (§ 620.4)

Proposed § 620.4, consistent with section 303(l), SSA, provides that a State may require applicants to take and pass a drug test for the illegal use of controlled substances as a condition of initial eligibility for UC under specified conditions. Applicants may be denied UC based on the results of these tests.

Proposed paragraph (a) provides that an applicant, as defined in proposed § 620.2, may be tested for the unlawful use of controlled substances, as defined in proposed § 620.2, as an eligibility condition for UC if the individual is one for whom suitable work, as defined by that State's UC law, is only available in an occupation that regularly conducts drug testing, as determined under proposed § 620.3. The reference to "applicant," ensures that only an applicant who is filing an initial UC claim, and not a claimant filing a continued claim, may be subject to drug testing.

Proposed paragraph (b) provides that a State requiring drug testing as a condition of UC eligibility may apply drug testing to any one or more of the occupations listed under § 620.3, but is not required to apply drug testing to any of them. The Act does not require a State to conduct drug tests at all, and consistent with the partnership nature of the Federal-State UC system, the Department proposes to allow States flexibility to decide which permitted occupations may be subject to State-conducted drug testing.

Proposed paragraph (c) provides that the standards which a State establishes relating to drug testing of applicants for UC must be in accordance with guidance issued by the Department. While section 303(l), SSA, requires the Secretary to issue regulations on the occupations that regularly conduct drug testing, the Secretary will address all other issues relating to section 303(l), SSA, in later guidance such as program letters and other issuances.

What are the consequences of failing to implement a drug testing program in accordance with these regulations? (§620.5)

Section 620.5 explains that implementation of drug testing of UC applicants as authorized under State laws must be in conformity with these regulations in order for States to be certified under Section 302 of the SSA (42 U.S.C. 502), with respect to whether a State is eligible to receive Federal grants for the administration of its UC program.

III. Administrative Information

Executive Orders 12866 and 13563: Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. For a “significant regulatory action,” E.O. 12866 asks agencies to describe the need for the regulatory action and explain how the regulatory action will meet that need, as well as assess the costs and benefits of the regulation.² This regulation is necessary because of the statutory requirement contained in new section 303(l)(1)(A)(ii), SSA, which requires the Secretary to determine the occupations that regularly conduct drug testing for the propose of determining which applicants may be drug tested when applying for State unemployment compensation. The Department considers this rule to be a “significant regulatory action” as defined in section 3(f) of E.O. 12866, because it raises novel legal or policy issues arising out of

² Executive Order No. 12866, section 6(a)(3)(B).

legal mandates. Before the amendment of Federal law to add new section 303(l)(1), SSA, drug testing of applicants for UC as a condition of eligibility was prohibited.

The Department believes this is not an economically significant rulemaking within the definition of E.O. 12866 because it is not an action that is likely to result in the following: an annual effect on the economy of \$100 million or more; an adverse or material effect on a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities; serious inconsistency or interference with an action taken or planned by another agency; or a material change in the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof. In addition, since the rule is entirely voluntary on the part of the States and since Section 303(l), SSA is written so narrowly that the number of UI applicants eligible to be tested will be small, the Department believes it is unlikely that many States will establish a testing program because they won't deem it cost effective to do so. The Department seeks comment from interested stakeholders on this assumption.

There are limited data on which to base estimates of the cost associated with establishing a testing program. Only one of the two States that have enacted a conforming drug testing law issued a fiscal note. That State is Texas, which estimated that the 5-year cost of administering the program would be \$1,175,954. This includes both one-time technology personnel services for the first year to program the system and ongoing administrative costs for personnel. The Texas analysis estimated a potential savings to the Unemployment Trust Fund of \$13,700,580 over the 5-year period, resulting in a net savings of approximately \$12.5 million. The Department believes it

would be inappropriate to extrapolate the Texas analysis to all States in part because of differences in the Texas law and the requirements in this proposed rule. The Department has included this information about Texas for illustrative purposes only and emphasizes that by doing so, it is not validating the methodology or assumptions in the Texas analysis. Under the proposed rule, States will be prohibited from testing applicants for unemployment compensation who do not meet the narrow criteria established in the law. The Department requests that interested stakeholders with data on the costs of establishing a state-wide testing program; the number of applicants for unemployment compensation that fit the narrow criteria established in the law; and estimates of the number of individuals that would subsequently be denied unemployment compensation due to a failed drug test submit it during the comment period.

In the absence of data, the Department is unable to quantify the administrative costs States will incur if they choose to implement drug testing pursuant to this rule. States may need to find funding to implement a conforming drug testing program for unemployment compensation applicants. No additional funding has been appropriated for this purpose and current Federal funding for the administration of State unemployment compensation programs may be insufficient to support the additional costs of establishing and operating a drug testing program. Permissible alternative funding sources are not readily available. States will need to fund the cost of the drug tests, staff costs for administration of the drug testing function, and technology costs to track drug testing outcomes. States will incur ramp up costs that will include implementing business processes necessary to determine whether an applicant is one for whom drug testing is permissible pursuant to the law; developing a process to refer and

track applicants referred for drug testing; and the costs of testing that meets the standards required by the Secretary of Labor. States will also have to factor in increased costs of adjudication and appeals of both the determination of applicability of the drug testing to the individual and of the resulting determinations of benefit eligibility based on the test results.

To date, very few States have expressed interest in drug testing unemployment compensation applicants. Only two States have enacted conforming legislation. Only six other States introduced conforming drug testing bills so far and none of them were passed by the house of introduction.

Benefits of the rule are equally hard to determine. As discussed above, the provisions will impact a very limited number of applicants for unemployment compensation benefits.

Paperwork Reduction Act

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et seq., include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing a summary of the collection of information, a brief description of the need for and proposed use of the information, and a request for comments on the information collections.

A Federal agency may not conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number (44 U.S.C. 3512).

The Department has determined that this proposed rule does not contain a “collection of information,” as the term is defined. See 5 CFR 1320.3(c). DOL expressly seeks comments on this determination.

Executive Order 13132: Federalism

Section 6 of Executive Order 13132 requires Federal agencies to consult with State entities when a regulation or policy may have a substantial direct effect on the States or the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government, within the meaning of the Executive Order. Section 3(b) of the Executive Order further provides that Federal agencies must implement regulations that have a substantial direct effect only if statutory authority permits the regulation and it is of national significance.

This proposed rule does not have a substantial direct effect on the States or the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of Government, within the meaning

of the Executive Order. This is because drug testing authorized by the regulation is voluntary on the part of the State, not required.

Unfunded Mandates Reform Act of 1995

This regulatory action has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (the Reform Act). Under the Reform Act, a Federal agency must determine whether a regulation proposes a Federal mandate that would result in the increased expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any single year. The Department has determined that since States have an option of drug testing UC applicants and can elect not to do so, this proposed rule does not include any Federal mandate that could result in increased expenditure by State, local, and Tribal governments. Drug testing under this rule is purely voluntary, so that any increased cost to the States is not the result of any mandate. Accordingly, it is unnecessary for the Department to prepare a budgetary impact statement.

Plain Language

The Department drafted this proposed rule in plain language.

Effect on Family Life

The Department certifies that this proposed rule has been assessed according to section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999

(Pub. L. 105-277, 112 Stat. 2681) for its effect on family well-being. The Department certifies that this proposed rule does not adversely impact family well-being as discussed under section 654 of the Treasury and General Government Appropriations Act of 1999.

Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603(a) requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis which will describe the impact of the proposed rule on small entities. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. This rule does not affect small entities as defined in the RFA. Therefore, the rule will not have a significant economic impact on a substantial number of these small entities. The Department has certified this to the Chief Counsel for Advocacy, Small Business Administration, pursuant to the Regulatory Flexibility Act.

List of Subjects in 20 CFR Part 620

Unemployment compensation

For the reasons stated in the preamble, the Department proposes to amend 20 CFR chapter V by adding part 620 to read as follows:

**PART 620 – OCCUPATIONS THAT REGULARLY CONDUCT DRUG TESTING
FOR STATE UNEMPLOYMENT COMPENSATION ELIGIBILITY
DETERMINATION PURPOSES**

Sec.

620.1 Purpose.

620.2 Definitions.

620.3 Occupations that regularly conduct drug testing for purposes of determining which applicants may be drug tested when applying for state unemployment compensation.

620.4 Testing of unemployment compensation applicants for the unlawful use of a controlled substance.

620.5 Conformity and substantial compliance.

Authority: 42 U.S.C. 1302(a); 42 U.S.C. 503(l)(1)(ii)

§ 620.1 Purpose.

The regulations in this part implement section 303(l) of the Social Security Act (SSA) (42 U.S.C. 503(l)). Section 303(l), SSA, permits States to enact legislation to provide for the State-conducted testing of an unemployment compensation applicant for the unlawful use of controlled substances, as a condition of unemployment compensation eligibility, if the applicant was discharged for unlawful use of controlled substances by his or her most recent employer, or if suitable work (as defined under the State unemployment compensation law) is only available in an occupation for which drug testing is regularly conducted (as determined under this part 620). Section 303(l)(1)(A)(ii), SSA, requires the Secretary of Labor to issue regulations determining the occupations that regularly conduct drug testing. These regulations are limited to that requirement.

§ 620.2 Definitions.

As used in this part—

Applicant means an individual who files an initial claim for unemployment compensation under State law. Applicant excludes an individual already found initially eligible and filing a continued claim.

Controlled substance means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of 21 U.S.C. 801 et seq., as defined in section 102 of the Controlled Substances Act (Pub. L. 91-513, 21 U.S.C. 801 et seq.). The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

Occupation means a position or class of positions. Federal and State laws governing drug testing refer to the classes of positions that are required to be drug tested rather than occupations, such as those defined by the Bureau of Labor Statistics in the Standard Occupational Classification System. Therefore, for purposes of this regulation, a position or class of positions will be considered the same as an “occupation.”

Suitable work means suitable work as defined by the unemployment compensation law of a State against which the claim is filed. It must be the same definition the State law otherwise uses for determining the type of work an individual must seek given the individual’s education, experience and previous level of remuneration.

Unemployment compensation means any cash benefits payable to an individual with respect to their unemployment under the State law (including amounts payable under an agreement under a Federal unemployment compensation law.)

§ 620.3 Occupations that regularly conduct drug testing for purposes of determining which applicants may be drug tested when applying for State unemployment compensation.

Occupations that regularly conduct drug testing, for purposes of § 620.4, are:

- (a) An occupation that requires the employee to carry a firearm;
- (b) An occupation identified in 14 CFR 120.105 (as in effect on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]) by the Federal Aviation Administration, in which the employee must be tested (Aviation flight crew members and air traffic controllers);
- (c) An occupation identified in 49 CFR 382.103 (as in effect on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]) by the Federal Motor Carrier Safety Administration, in which the employee must be tested (Commercial drivers);
- (d) An occupation identified in 49 CFR 219.3 (as in effect on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]) by the Federal Railroad Administration, in which the employee must be tested (Railroad operating crew members);
- (e) An occupation identified in 49 CFR 655.3 (as in effect on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]) by the Federal Transit Administration, in which the employee must be tested (Public transportation operators);
- (f) An occupation identified in 49 CFR 199.2 (as in effect on [INSERT DATE

OF PUBLICATION IN THE FEDERAL REGISTER]) by the Pipeline and Hazardous Materials Safety Administration, in which the employee must be tested (Pipeline operation and maintenance crew members);

(g) An occupation identified in 46 CFR 16.201(as in effect on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]) by the United States Coast Guard, in which the employee must be tested (Crewmembers and maritime credential holders on a commercial vessel);

(h) An occupation specifically identified as requiring an employee to be tested for controlled substances in a State law that took effect no later than [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], and still remains in effect. DOL seeks comments specifically on how to refresh the list of occupations.

§ 620.4 Testing of unemployment compensation applicants for the unlawful use of a controlled substance.

(a) States may conduct a drug test on an unemployment compensation applicant, as defined in § 620.2 of this part, for the unlawful use of controlled substances, as defined in § 620.2, as a condition of eligibility for unemployment compensation if the individual is one for whom suitable work, as defined in State law, as defined in § 620.2, is only available in an occupation that regularly conducts drug testing under § 620.3 of this part. Drug testing is permitted only of an applicant, and not of an individual filing a continued claim for unemployment compensation after initially being determined eligible. No State is required to apply drug testing to UC applicants under this part 620.

(b) A State conducting drug testing as a condition of unemployment compensation eligibility as provided in paragraph (a) of this section may apply drug testing only to the occupations listed under § 620.3, but is not required to apply drug testing to any of them.

(c) State standards governing drug testing of UC applicants must be in accordance with guidance, in the form of program letters or other issuances, issued by the Department of Labor.

§ 620.5 Conformity and substantial compliance.

(a) In general. A State law implementing the drug testing of applicants for unemployment compensation must conform with, and the law's administration must substantially comply with, the requirements of this part 620 for purposes of certification under section 302 of the SSA (42 U.S.C. 502), of whether a State is eligible to receive Federal grants for the administration of its UC program.

(b) Resolving issues of conformity and substantial compliance. For the purposes of resolving issues of conformity and substantial compliance with the requirements of this part 620, the following provisions of 20 CFR 601.5 apply:

(1) Paragraph (b) of 20 CFR 601.5, pertaining to informal discussions with the Department of Labor to resolve conformity and substantial compliance issues, and

(2) Paragraph (d) of 20 CFR 601.5, pertaining to the Secretary of Labor's hearing and decision on conformity and substantial compliance.

(c) Result of failure to conform or substantially comply. Whenever the Secretary of Labor, after reasonable notice and opportunity for a hearing to the State UC agency, finds

that the State UC law fails to conform, or that the State or State UC agency fails to comply substantially, with the requirements of title III, SSA (42 U.S.C. 501-504), as implemented in this part 620, then the Secretary of Labor must notify the Governor of the State and such State UC agency that further payments for the administration of the State UC law will not be made to the State until the Secretary of Labor is satisfied that there is no longer any such failure. Until the Secretary of Labor is so satisfied, the Department of Labor will not make further payments to such State.

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